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13 *Dr. Andrew Forrest*

14
15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN JOSE DIVISION**

18 DR. ANDREW FORREST, an individual,

19 Plaintiff,

20 v.

21 FACEBOOK, INC., a corporation; and
22 DOES 1 through 20,

23 Defendants.

Case No. 5:22-cv-03699-EJD (VKD)

24 **DECLARATION OF JOSE R. NUÑO**
25 **IN SUPPORT OF DR. ANDREW**
26 **FORREST'S MOTION FOR LEAVE**
27 **TO AMEND THE SECOND**
28 **AMENDED COMPLAINT**

Judge: Hon. Edward J. Davila

Hearing Date: January 19, 2023

Time: 9:00 a.m.

Courtroom: 4

Trial Date: Not yet set

Concurrently Filed with the Notice of
Motion and Motion for Leave to Amend
the Second Amended Complaint;
Request for Judicial Notice; [Proposed]
Order

1 I, Jose R. Nuño, declare as follows:

2 1. I am an attorney licensed to practice in the State of California and am
3 admitted to practice in the United States District Court for the Northern District of
4 California. I am an attorney at Waymaker LLP, counsel of record to Plaintiff Dr.
5 Andrew Forrest (“Dr. Forrest”) in this action. I make this Declaration in support of
6 Dr. Forrest’s Motion for Leave to Amend his Second Amended Complaint
7 (“Motion”). I have personal knowledge of the facts set forth herein and if called as a
8 witness I could and would testify competently thereto.

9 2. On September 17, 2021, Dr. Forrest filed his complaint against
10 defendant Facebook, Inc. (“Facebook”), and filed his first amended complaint
11 (“FAC”) on November 12, 2021, both in San Mateo County Superior Court. The
12 FAC asserted five causes of action, inclusive of a cause of action for negligent
13 design.

14 3. After several extensions of Facebook’s responsive pleading deadline,
15 Facebook demurred to the FAC on January 18, 2022. The matter was fully briefed
16 and set for hearing on April 22, 2022 in front of San Mateo Superior Court Judge,
17 Robert D. Foiles.

18 4. On April 21, 2022, Judge Foiles issued a tentative ruling sustaining
19 Facebook’s demurrer to the first through fourth causes of action without prejudice,
20 and to the fifth cause of action for negligent design, without leave to amend. With
21 respect to this cause of action, the only reasoning Judge Foiles gave for dismissing
22 the claim with prejudice was that: “Plaintiff cites no authority holding that the legal
23 theory of products liability, including duty of care, extends to interactive computer
24 services.” A true and correct copy of Judge Foiles’ April 21, 2022 tentative order is
25 attached here as Exhibit A. On April 22, 2022, Judge Foiles heard oral argument on
26 the demurrer.

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1 5. On May 4, 2022, Judge Foiles entered his order affirming his tentative
2 ruling in its entirety, except that Dr. Forrest was granted until June 3, 2022, to file a
3 second amended complaint as to the first four causes of action (“Order”). A true and
4 correct copy of Judge Foiles’ May 4, 2022 Order is attached here as Exhibit B and is
5 Docket Entry No. 1-2 in this Action.

6 6. On May 5, 2022, Judge Foiles’ court clerk served notice of the Order by
7 mail. A true and correct copy of the May 5, 2022 notice is attached here as Exhibit
8 C.

9 7. After receiving the Order, my office began preparing a Writ of Mandate
10 to file in the California Appellate Court to challenge Judge Foiles’ dismissal of the
11 negligent design claim with prejudice. The entire writ was drafted and complete and
12 Dr. Forrest was days away from filing the writ at the time Facebook removed this
13 case to federal court on June 23, 2022. Based on my understanding, Dr. Forrest’s
14 deadline to file his writ was July 5, 2022.

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1 8. On July 14, 2022, Donald Pepperman, an attorney at my office, sent an
2 email to Facebook's counsel notifying Facebook about the instant motion and asking
3 whether Facebook would stipulate or consent to allow Dr. Forrest to file a third
4 amended complaint to add back his claim for negligent design. Dr. Forrest offered to
5 provide Facebook with a draft of the third amended complaint for review. Facebook
6 responded that same day that it would not stipulate without bothering to review the
7 proposed third amended complaint.

8
9 I declare under penalty of perjury under the laws of the United States and the
10 State of California that the foregoing is true and correct.

11 Executed on this 25th day of July, 2022, at Los Angeles, California.



Jose R. Nuño

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Law and Motion Calendar
Judge: HONORABLE ROBERT D FOILES
Department 21

400 County Center, Redwood City
Courtroom 2J

Friday, April 22, 2022

IF YOU INTEND TO APPEAR ON ANY CASE ON THIS CALENDAR, YOU MUST DO EITHER #1 OR #2, AND YOU MUST DO #3 OF THE FOLLOWING:

1. EMAIL Dept21@Sanmateocourt.org BEFORE 4:00 P.M.
CONTEMPORANEOUSLY COPIED TO ALL PARTIES OR THEIR COUNSEL OF RECORD. IF BY EMAIL, IT MUST INCLUDE THE NAME OF THE CASE, THE CASE NUMBER, AND THE NAME OF THE PARTY CONTESTING THE TENTATIVE RULING
2. YOU MUST CALL (650) 261-5121 BEFORE 4:00 P.M. AND FOLLOW THE INSTRUCTIONS ON THE MESSAGE.
3. You must give notice before 4:00 P.M. to all parties of your intent to appear pursuant to California Rules of Court 3.1308(a) (1) .

Failure to do both items 1 or 2, and 3 will result in no oral presentation.

At this time, appearances can be by Zoom Video or by Personal Appearance.
Sign in using your first and last name. Mute your line until your case is called.
RECORDING OF A COURT PROCEEDING IS PROHIBITED.
PERSONAL APPEARANCES ALLOWED.

Zoom Video Information: **NEW CREDENTIALS BELOW (AS OF 07/13/21):**

<https://sanmateocourt.zoomgov.com/>

Meeting ID: 161 328 2775

Password: 392539

Please note: Zoom Meeting can be joined directly from Judge Foiles' page on the court's website.

TO ASSIST THE COURT REPORTER, the parties are ORDERED to: (1) state their name each time they speak and only speak when directed by the Court; (2) not to interrupt the Court or anyone else; (3) speak slowly and clearly; (4) use a dedicated land line if at all possible, rather than a cell phone; (5) if a cell phone is absolutely necessary, the parties must be stationary and not driving or moving; (6) no speaker phones under any circumstances; (7) provide the name and citation of any case cites; and (8) spell all names, even common names.

Case

Title / Nature of Case

9:00

LINE: 6

21-CIV-05055 DR. ANDREW FORREST VS. FACEBOOK, INC.

DR. ANDREW FORREST
FACEBOOK, INC.

BRIAN E. KLEIN
JACOB M. HEATH

HEARING ON DEMURRER TO PLAINTIFF'S AMENDED COMPLAINT BY DEFENDANT
FACEBOOK, INC.

TENTATIVE RULING:

Demurrer based on Communications Decency Act

Demurrer to the entire complaint based on the Communications Decency Act ("CDA") is sustained as to the first, second, third, fourth, and fifth causes of action. (47 U.S.C. § 230, subd. (c)(1).)

In *Force v. Facebook*, the plaintiffs were survivors of persons who were killed in Israel by members of Hamas. The plaintiffs alleged that Facebook was liable for "giving Hamas a forum with which to communicate and for actively bringing Hamas' message to interested parties." Like Plaintiff Forrest, the plaintiffs in *Force* alleged that Facebook "does not act as a publisher," because "it uses algorithms to suggest content to users, resulting in 'matchmaking.'" The Court of Appeal held that using "matchmaking" algorithms to direct content to readers is a function of a publisher. "[A]rranging and distributing third-party information inherently forms 'connections' and 'matches' among speakers, content, and viewers of content, whether in interactive internet forums or in more traditional media. That is an essential result of publishing." (*Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, 66.)

Like a publisher, Facebook decided "where . . . particular third-party content should reside and to whom it should be shown. . . ., [and] what type and format of third-party content they will display." (*Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, 66-67.)

Facebook's algorithms might cause more such "matches" than other editorial decisions. But that is not a basis to exclude the use of algorithms from the scope of what it means to be a "publisher" under Section 230(c)(1). The matches also might . . . present users with targeted content of even more interest to them But it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at

performing the functions of publishers, they are no longer immunized from civil liability.

(Id.)

The *Force* case involved algorithms that directed content to readers who might be more interested in the content ("matchmaking") Plaintiff Forrest's complaint repeatedly describes Facebook's acts as "curating the user experience." Without defining "curating," Plaintiff alleges that Facebook is doing exactly what it was doing in the *Force* case: using algorithms to direct content to a subset of users based on those users' interests and demographics ("data points" (see FAC ¶¶ 3-4, 11, 53, 57, 71.)

As in *Force*, Forrest's claims are based on Facebook's using automation to determine where certain ads are seen and by whom. Facebook is being sued for its role as a publisher of ads. Therefore, Section 230(c)(1) immunizes Facebook from liability for all claims arising from Facebook's role as a publisher.

Demurrers to the first, second, third, fourth, and fifth claims are be sustained because each of those claims is based on allegations that Facebook committed acts in the role of a publisher, which Section 230(c)(1) precludes.

Additional Grounds for Sustaining Demurrer

In addition to immunity under the CDA, demurrer to the Second, Fourth, and Fifth causes of action is sustained for the following reasons.

Demurrer to the Second Cause of Action is sustained because "substantial assistance" may occur only when the Defendant's "own conduct, separately considered, constitutes a breach of duty to the third person." (*Saunders v. Super. Ct.* (1994) 27 Cal. App.4th 832, 846.) "It is essential that the defendant's own conduct was tortious. The particular defendant who is to be charged with responsibility must have proceeded tortiously - i.e., with intent to commit a tort or with negligence." (*Coffman v. Kennedy* (1977) 74 Cal. App. 3d 28, 32.) The FAC does not allege any acts by Facebook that are independently tortious.

Demurrer to the Fourth Cause of Action is sustained because a duty to warn does not exist absent a special relationship between Facebook and Plaintiff. (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal. 3d 425, 435.) Plaintiff Forrest argues that a special relationship is required only when "nonfeasance" causes harm, whereas Plaintiff alleges "misfeasance." (Opp. at 12-13.) The alleged misfeasance, however, consists of acts of a publisher, which are immunized by the CDA.

Demurrer to the Fifth Cause of Action is sustained without leave to amend because Negligent design is a products liability concept. (See Opp. at 12:16-18.) Plaintiff cites no authority holding that the legal theory of products liability, including duty of care, extends to interactive computer services.

Terms of Service and Statute of Limitations Arguments Lack Merit.

1. Demurrer based on Terms of Service lacks merit. The Terms of Service document provides that the Terms govern "your" use of Facebook. (Mov. RJN, Ex. A, at p.1.) The claims in the FAC are not based on Plaintiff's use of Facebook; they are based on Facebook's conduct. Therefore, the Terms of Service do not apply to Forrest's claims. The claims asserted by Forrest could be asserted by a person who never used Facebook, but suffered the same harm. It is unreasonable to hold that the Terms of Service are a defense against a Facebook user, but not against a non-Facebook user who has suffered the same harm.

2. Demurrer based on statute of limitations lacks merit. The demurrer is based on the allegation that Forrest knew of his claims "on or about late March 2019." (Mov. at 20:10.) When a Complaint alleges that a cause of action accrued "on or about" a specific date, a statute-of-limitations argument does not support demurrer. (*Childs v. State of California* (1983) 144 Cal. App. 3d 155, 159-60.) Further, Judicial Council Emergency Rule 9.12 extends the limitations period for six months. Even if "on or about late March 2019" could be an operative date of accrual, the six-month tolling extends the limitations period to some unspecified date in September 2021. The demurrer does not establish that the common law claims are time-barred as a matter of law.

Ruling

Demurrer is sustained as to all causes of action. Plaintiff is granted leave of court to file and serve a Second Amended Complaint addressing the above defects, except for the Fifth Cause of action for which leave is not granted, no later than May 20, 2022.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant Facebook, Inc. shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court.

EXHIBIT B

1 JACOB M. HEATH (STATE BAR NO. 238959)
jheath@orrick.com
2 ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
3 Menlo Park, CA 94025-1015
Telephone: +1 650 614 7400
4 Facsimile: +1 650 614 7401

5 Attorneys for Defendant
FACEBOOK, INC.

Electronically

FILED

By Superior Court of California, County of San Mateo

ON 05/05/2022

By /s/ Jimenez, Vanessa

Deputy Clerk

Electronically
RECEIVED

4/26/2022

CLERK OF THE SUPERIOR COURT
SAN MATEO COUNTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

11 DR. ANDREW FORREST, an individual,

12 Plaintiff,

13 v.

14 FACEBOOK, INC., a Delaware Corporation,
and DOES 1 through 20, inclusive,

15 Defendant.
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Case No. 21-CIV-05055

**[PROPOSED] ORDER SUSTAINING
DEFENDANT FACEBOOK INC's
DEMURRER**

Hearing Date: April 22, 2022
Time: 9am
Dept: Department 21
Judge: Robert D. Foiles
Trial Date: None Set
Date Action Filed: September 17, 2021

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[PROPOSED] ORDER

On April 22, 2022, the Court heard oral argument on Defendant Facebook, Inc.’s (“Facebook”) demurrer (“Demurrer”) to Plaintiff Dr. Andrew Forrest’s First Amended Complaint (“FAC”). After hearing and considering the parties’ positions as to the Demurrer, the Court adopted its April 21, 2022 tentative ruling (“Tentative Ruling”) sustaining the Demurrer with prejudice as to the Fifth Cause of Action of Plaintiff’s FAC and without prejudice as to First through Fourth Causes of Action of the FAC.

The Court granted Plaintiff until June 3, 2022 to file and serve a Second Amended Complaint with respect to the First through Fourth Causes of Action. The Tentative Ruling, attached to this order as **Exhibit A**, is otherwise adopted.

IT IS ORDERED.

Electronically

SIGNED

By /s/ Foiles, Robert

05/04/2022

Dated _____, 2022

HON. ROBERT D. FOILES
JUDGE OF THE SUPERIOR COURT

EXHIBIT A

9:00

LINE: 6

21-CIV-05055 DR. ANDREW FORREST VS. FACEBOOK, INC.

DR. ANDREW FORREST
FACEBOOK, INC.

BRIAN E. KLEIN
JACOB M. HEATH

HEARING ON DEMURRER TO PLAINTIFF'S AMENDED COMPLAINT BY DEFENDANT
FACEBOOK, INC.

TENTATIVE RULING:

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Demurrer to the entire complaint based on the Communications Decency Act ("CDA") is sustained as to the first, second, third, fourth, and fifth causes of action. (47 U.S.C. § 230, subd. (c)(1).)

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performing the functions of publishers, they are no longer immunized from civil liability.

(Id.)

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As in *Force*, Forrest's claims are based on Facebook's using automation to determine where certain ads are seen and by whom. Facebook is being sued for its role as a publisher of ads. Therefore, Section 230(c)(1) immunizes Facebook from liability for all claims arising from Facebook's role as a publisher.

Demurrers to the first, second, third, fourth, and fifth claims are be sustained because each of those claims is based on allegations that Facebook committed acts in the role of a publisher, which Section 230(c)(1) precludes.

Additional Grounds for Sustaining Demurrer

In addition to immunity under the CDA, demurrer to the Second, Fourth, and Fifth causes of action is sustained for the following reasons.

Demurrer to the Second Cause of Action is sustained because "substantial assistance" may occur only when the Defendant's "own conduct, separately considered, constitutes a breach of duty to the third person." (*Saunders v. Super. Ct.* (1994) 27 Cal. App.4th 832, 846.) "It is essential that the defendant's own conduct was tortious. The particular defendant who is to be charged with responsibility must have proceeded tortiously - i.e., with intent to commit a tort or with negligence." (*Coffman v. Kennedy* (1977) 74 Cal. App. 3d 28, 32.) The FAC does not allege any acts by Facebook that are independently tortious.

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2. Demurrer based on statute of limitations lacks merit. The demurrer is based on the allegation that Forrest knew of his claims "on or about late March 2019." (Mov. at 20:10.) When a Complaint alleges that a cause of action accrued "on or about" a specific date, a statute-of-limitations argument does not support demurrer. (*Childs v. State of California* (1983) 144 Cal. App. 3d 155, 159-60.) Further, Judicial Council Emergency Rule 9.12 extends the limitations period for six months. Even if "on or about late March 2019" could be an operative date of accrual, the six-month tolling extends the limitations period to some unspecified date in September 2021. The demurrer does not establish that the common law claims are time-barred as a matter of law.

Ruling

Demurrer is sustained as to all causes of action. Plaintiff is granted leave of court to file and serve a Second Amended Complaint addressing the above defects, except for the Fifth Cause of action for which leave is not granted, no later than May 20, 2022.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant Facebook, Inc. shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court.

EXHIBIT C

1 JACOB M. HEATH (STATE BAR NO. 238959)
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2 ORRICK, HERRINGTON & SUTCLIFFE LLP
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3 Menlo Park, CA 94025-1015
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5 Attorneys for Defendant
FACEBOOK, INC.

Electronically

FILED

By Superior Court of California, County of San Mateo
ON 05/05/2022

By /s/ Jimenez, Vanessa
Deputy Clerk

Electronically
RECEIVED

4/26/2022

CLERK OF THE SUPERIOR COURT
SAN MATEO COUNTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

11 DR. ANDREW FORREST, an individual,
12 Plaintiff,

13 v.

14 FACEBOOK, INC., a Delaware Corporation,
and DOES 1 through 20, inclusive,
15 Defendant.
16

Case No. 21-CIV-05055

**[PROPOSED] ORDER SUSTAINING
DEFENDANT FACEBOOK INC's
DEMURRER**

Hearing Date: April 22, 2022
Time: 9am
Dept: Department 21
Judge: Robert D. Foiles
Trial Date: None Set
Date Action Filed: September 17, 2021

[PROPOSED] ORDER SUSTAINING DEFENDANT FACEBOOK INC.'S DEMURRER
CASE NO. 21-CIV-05055

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PROPOSED ORDER

On April 22, 2022, the Court heard oral argument on Defendant Facebook, Inc.'s ("Facebook") demurrer ("Demurrer") to Plaintiff Dr. Andrew Forrest's First Amended Complaint ("FAC"). After hearing and considering the parties' positions as to the Demurrer, the Court adopted its April 21, 2022 tentative ruling ("Tentative Ruling") sustaining the Demurrer with prejudice as to the Fifth Cause of Action of Plaintiff's FAC and without prejudice as to First through Fourth Causes of Action of the FAC.

The Court granted Plaintiff until June 3, 2022 to file and serve a Second Amended Complaint with respect to the First through Fourth Causes of Action. The Tentative Ruling, attached to this order as **Exhibit A**, is otherwise adopted.

IT IS ORDERED.

Electronically
SIGNED
By /s/ Foiles, Robert
05/04/2022

Dated _____, 2022

HON. ROBERT D. FOILES
JUDGE OF THE SUPERIOR COURT



SUPERIOR COURT OF SAN MATEO COUNTY

Civil Department
400 County Center, Redwood City, CA 94063
(650) 261-5100
www.sanmateocourt.org

AFFIDAVIT OF MAILING

Date: 5/5/2022

In the Matter of: DR. ANDREW FORREST, vs. FACEBOOK, INC., a Delaware Corporation, et al
Case No.: 21-CIV-05055


I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at Redwood City, a true copy of the attached document(s) ORDER SUSTAINING DEFENDANT FACEBOOK INC'S DEMURRER, enclosed in an envelope, with proper and necessary postage thereon, and addressed to the following:

Executed on: 5/5/2022

Neal I Taniguchi, Court Executive Officer/Clerk

By: /s/ Vanessa Jimenez
Vanessa Jimenez, Deputy Clerk

Copies Mailed To:

 **BRIAN E KLEIN**
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